

Rule 43. Defendant's Presence

(a) DEFINITIONS. As used in this rule:

(1) "Misdemeanor" means an offense punishable by fine only, imprisonment for not more than one year, or both.

(2) "Felony" means an offense punishable by imprisonment for more than one year.

(b) PHYSICAL PRESENCE REQUIRED. Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be physically present at:

(1) the initial appearance, arraignment, and plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

(c) PRESENCE BY VIDEO TELECONFERENCING OR TELEPHONE

CONFERENCING PERMITTED. A defendant need not be physically present under the following circumstances:

(1) *Misdemeanor; any Proceeding by Video Teleconferencing or Telephone Conferencing.* The court may permit a defendant charged with a misdemeanor to appear by video teleconferencing or telephone conferencing for any proceeding, including arraignment, plea, trial, sentencing, or other hearing, if:

(A) the defendant consents after consultation with counsel;

(B) the government consents; and

(C) the court makes an inquiry on the record to ensure that:

(i) the defendant's consent is knowing, voluntary, and intelligent; and

(ii) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.

(2) *Felony; Plea, Sentencing, or Other Nontrial Hearing by Video Teleconferencing.* The court may permit a defendant charged with a felony to appear for a plea, sentencing, or other nontrial hearing by video teleconferencing if:

(A) the defendant consents after consultation with counsel;

(B) the government consents; and

(C) the court makes an inquiry on the record to ensure that:

(i) the defendant's consent is knowing, voluntary, and intelligent; and

(ii) the defendant has an adequate opportunity to consult confidentially with counsel immediately before, during, and at the conclusion of the proceeding.

(d) [Deleted].

(e) PRESENCE NOT REQUIRED. A defendant need not be present, physically or otherwise, under any of the following circumstances:

(1) *Organizational Defendant.* The defendant is an organization represented by counsel who is present.

(2) *Defendant's Waiver; Misdemeanor Proceeding other than Plea, Trial, or Sentencing.* The court may permit a misdemeanor proceeding other than a plea, trial, or sentencing to occur in the defendant's absence if:

(A) the defendant, after consultation with counsel, waives the constitutional right to be present; and

(B) the government consents.

(3) *Conference or Hearing on a Legal Question.* The proceeding involves only a conference or hearing on a question of law.

(4) *Sentence Correction*. The proceeding involves the correction or reduction of sentence under Rule 35.

(f) WAIVING CONTINUED PRESENCE.

(1) *In General*. A defendant who was initially present at trial waives the right to be present under the following circumstances:

(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;

(B) when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) *Waiver's Effect*. If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

COMMENT TO 2022 AMENDMENTS

Rule 43 has been amended to expand the Superior Court's authority to permit a defendant to appear by video teleconferencing or telephone conferencing, i.e., remotely. The amended rule also clarifies when a defendant must be physically present, when the defendant may participate remotely, and when a proceeding may occur in a defendant's absence. The amendments largely track, and make permanent, the court's temporary emergency authority to expand the types of proceedings that could occur remotely (former section (d)). The court's experience during COVID-19 has shown that remote proceedings function well.

Subsection (c) (former section (b)(2)) has been divided into two parts. Subsection (c)(1)(A) now permits any misdemeanor proceeding to occur remotely. The former rule, like the federal rule, permitted only a misdemeanor arraignment, plea, trial, or sentencing to occur remotely. New section (c)(2)(B) permits a felony plea, sentencing, or other nontrial hearing to occur remotely, although only by video teleconferencing, unlike the federal rule which does not provide for remote felony proceedings. New section (a) defines the terms misdemeanor and felony, and the remaining sections have been redesignated accordingly.

Finally, the amended rule specifies additional conditions under which the court may permit a proceeding to occur remotely or in the defendant's absence. Minor revisions also have been made for clarity and to conform to the general restyling of the rules.

COMMENT TO 2020 TEMPORARY AMENDMENTS

New section (d) expands the list of proceedings that may be conducted by video teleconference or telephone conference if the Chief Judge has issued an order under D.C. Code § 11-947 (2019 Supp.) based on COVID-19. For preliminary hearings, felony pleas, and felony sentencings, there must also be a case specific finding. The section is modeled after provisions in the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136 (CARES Act), § 15002 (2020), and resulting district court orders. The CARES Act permitted the Judicial Conference of the United States to find that

emergency conditions materially affected the functioning of the federal courts or a particular district court of the United States. The Chief Judge of a covered district court could then authorize the use of video conferencing or telephone conferencing for additional proceedings with certain conditions.

COMMENT TO 2017 AMENDMENTS

This rule incorporates the 2011 amendment to *Federal Rule of Criminal Procedure* 43. Subsection (b)(2) has been amended to permit proceedings in misdemeanor cases to occur by video teleconference, if the defendant consents in writing and the court approves.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It is identical to the federal rule except that subparagraph (c)(1)(B) omits the phrase “in a noncapital case” since there are no such cases in Superior Court.

The former Superior Court rule did not permit the court to impose sentence on a defendant who was voluntarily absent. As amended, this rule does permit it, and so conforms to the changes made in the federal rule in 1995.